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In the Supreme Court of the United States

October Term 1982

No.

C.B. FOODS, INC.,
Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether transactions between parties who are residents of the same state fall within definition of "interstate commerce" contained in the Perishable Agricultural Commodities Act where the agricultural commodities involved in those transactions did not cross state lines in connection with said transactions, but where such commodities had previously crossed state lines in connection with earlier transactions in which the party which is subject to a PACA disciplinary proceeding was not involved.

2. Whether the Secretary of Agriculture has jurisdiction over such intrastate transactions in perishable agricultural commodities.

3. Whether the "Rule of Deference" to agency construction of statute administered by such agency is applicable to the Department of Agriculture's construction of the interstate commerce provisions of the PACA.

4. Whether the "Rule of Deference" is a viable rule of statutory construction.

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C.B. FOODS, INC.,
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UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, C. B. Foods, Inc., by counsel, respectfully prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered March 29, 1982.

OPINIONS BELOW

The Judgment Order of the Court of Appeals, as yet unreported, appears at Appendix A. The July 13, 1981 Decision and Order of the Judicial Officer of the United States Department of Agriculture (Appendix C) is reported at 40 Agr. Dec. 961 (1981).

JURISDICTION

The judgment of the Court of Appeals (Appendix A) was entered on March 29, 1982. A petition for rehearing timely filed was denied on April 23, 1982 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves §1(3), §1(8) and §2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. §499(a) *et seq.*) which is hereinafter referred to as "PACA" or "Act".

1. Section 2(4) of the PACA (7 U.S.C. §499(b)(4)) provides in pertinent part:

> 2. It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> • • •
>
> (4) For any commission merchant dealer, or broker to...fail or refuse truly and correctly to account and make full payment promptly in respect of any such commodity to the person with whom such transaction is had....

2. Section 1(3) of the PACA (7 U.S.C. §499(a)(3)) provides:

> (3) The term "interstate or foreign commerce" means commerce between a State or Territory or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia.

3. Section 1(8) of the PACA (7 U.S.C. §499(a)(8)) provides:

> A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade of that commodity whereby such commodity and/or the products of such commodity are sent from one state with the exception that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another state, or for processing within the state and shipment outside the state of the products resulting from such processing. Com-

modities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act.

QUESTIONS PRESENTED

1. Whether transactions between parties who are residents of the same state fall within definition of "interstate commerce" contained in the Perishable Agricultural Commodities Act where the agricultural commodities involved in those transactions did not cross state lines in connection with said transactions, but where such commodities had previously crossed state lines in connection with earlier transactions in which the party which is subject to a PACA disciplinary proceeding was not involved.

2. Whether the Secretary of Agriculture has jurisdiction over such intrastate transactions in perishable agricultural commodities.

3. Whether the "Rule of Deference" to agency construction of statute administered by such agency is applicable to the Department of Agriculture's construction of the interstate commerce provisions of the PACA.

4. Whether the "Rule of Deference" is a viable rule of statutory construction.

STATEMENT

This action arises out of the Perishable Agricultural Commodities Act of 1930 (PACA), as amended, 7 U.S.C. §499(a) *et seq.* On October 30, 1972, the Respondent issued to Petitioner, pursuant to the provisions of PACA, License No. 730498, which authorized Petitioner to engage in the wholesale handling of fresh fruits and vegetables.

Petitioner, a Pennsylvania corporation, at all times material to this action maintained its principal place of business in the City of Pittsburgh, Allegheny County, Pennsylvania.

During the months of January and February, 1979, Petitioner ordered and took delivery from various sellers located in Pittsburgh, Pennsylvania, certain lots of various agricultural commodities. The Administrative Law Judge found that the number of lots of agricultural commodities ordered and delivered during this period totalled 222, having an aggregate value of $179,897.04.

All of the agricultural commodities acquired by Petitioner were purchased by it from firms located in Pittsburgh, Pennsylvania, and were delivered to Petitioner's warehouse in Pittsburgh, Pennsylvania, without traveling from, through or to any other state.

On February 26, 1979 Petitioner filed a Voluntary Petition in Bankruptcy in the United States District Court for the Western District of Pennsylvania at Bankruptcy No. 79-135. By reason of its bankruptcy, Petitioner failed to pay for the lots of agricultural commodities which it had received in January and February of 1979.

The instant action was commenced on January 25, 1980, when the Director of the Fruit and Vegetable Division, Agricultural Marketing Service, filed a Complaint against Petitioner, alleging therein that Petitioner had violated §2(4) of the PACA by failing to make full payment promptly for the lots of perishable agricultural commodities acquired by Petitioner from sellers during the period September, 1978 through February, 1979. (App. E, *infra*, 21a-38a).

On February 19, 1980, Respondent filed an answer to the Complaint which denied the alleged violation of the Act. An amended answer was filed on January 22, 1981, which asserted a number of affirmative defenses, including, *inter alia*, the alleged lack of jurisdiction of the Secretary of Agriculture to adjudicate any claims arising from intrastate transactions. (App. F, *infra*, 39a-41a).

A hearing on the Complaint was held on February 11, 1981 in Pittsburgh, Pennsylvania before the Honorable John

A. Campbell, Administrative Law Judge. On May 12, 1981, Judge Campbell filed a Decision and Order, which held that the Petitioner had committed repeated, flagrant and willful violations of §2(4) of the Act, in that it failed to pay for the lots of agricultural commodities which it had received in January and February, 1979. The Administrative Law Judge ordered that the facts and circumstances of those violations to be published.

On June 4, 1981, Petitioner filed an Appeal Petition with the Judicial Officer of the Department of Agriculture, arguing therein, *inter alia*, that the Secretary of Agriculture lacked jurisdiction over the specific transactions alleged in the Director's Complaint, since none of the transactions were in interstate commerce as that term is defined by PACA.

On July 13, 1981 the Judicial Officer filed a Decision and Order affirming the decision of the Administrative Law Judge. (App. C, *infra*, 4a-17a).

On July 31, 1981 Petitioner filed with the Court of Appeals for the Third Circuit pursuant to the provisions of 28 U.S.C. §2344, its Petition for Review of Order, requesting therein that the Court review and set aside the Decision and Order of the Judicial Officer and to order that the Complaint filed against it be dismissed. (App. D, *infra*, 18a-20a). Jurisdiction of the Court of Appeals was invoked under 28 U.S.C. §2342.

On March 4, 1982, the Petition for Review of Order was submitted to a panel of the Court of Appeals for the Third Circuit consisting of Hunter, Weis and Higginbotham, Circuit Judges pursuant to Third Circuit Rule 12(b). On March 29, 1982, the panel, per Hunter, J. issued a Judgment Order denying the Petition for Review of Order. (App. A, *infra*, 1a-2a).

Petitioner timely filed a Petition for Rehearing, which was timely denied by the Court of Appeals, per Hunter, J., on April 23, 1982. (App. B, *infra*, 3a).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Extends The Jurisdiction Of The Secretary Of Agriculture Beyond Limits Permitted By The Statute

This case presents important questions concerning the jurisdiction of the Secretary of Agriculture over transactions in perishable agricultural commodities which are purely intrastate. The Court of Appeals, in affirming the decision of the Judicial Officer, has permitted the Secretary of Agriculture to extend such jurisdiction beyond the point clearly permitted by the PACA. As a result, petitioner may be subjected to the disciplinary provisions of the Act even though its activities were not within the scope of the Act.

Such ruling allows the exercise of power by the Secretary of Agriculture beyond the proper jurisdictional reach of the Act. Because the ruling will permit the Secretary to take disciplinary measures against the Petitioner for activities beyond his jurisdiction, and because no federal court has ever addressed the issue raised by Petitioner, review of the Decision below is essential.

As noted, *supra*, Respondent has found that Petitioner is guilty of violating §2(4) of the PACA in failing to make full payment promptly for certain lots of agricultural commodities which it received in January and February of 1979. The relevant portion of §2(4) provides:

> 2. It shall be unlawful in or in connection with *any transaction in interstate or foreign commerce*—
>
> * * *
>
> (4) For any commission merchant, dealer, or broker to...fail or refuse truely and correctly to account and make full payment promptly in respect of any such commodity to the person with whom such transaction is had...(Emphasis supplied).

For the purpose of the Perishable Agricultural Commodities Act the term "interstate commerce" is defined by section 1(3) of the Act (7 U.S.C. §499(a)(3)) as follows:

> The term 'interstate or foreign commerce' means commerce between a State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside.

The record below clearly establishes that the transactions in which Petitioner engaged did not result in the sellers of those commodities shipping them across state lines to Petitioner. Nor did Petitioner ship or intend to ship those commodities across state lines after it acquired the commodities. Rather, Petitioner acquired commodities which were already in Pennsylvania from Pennsylvania sellers, and it resold the commodities to Pennsylvania buyers. Thus, at first blush it would appear transactions of the sort engaged in by Petitioner do not fall within the interstate commerce provisions of §1(3) of the Act.

However, the scope of the Act's jurisdiction over interstate transactions must also be considered in light of §1(8) of the Act. Section 1(8) (7 U.S.C. §499a(8)) provides as follows:

> A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade of that commodity whereby such commodity and/or the products of such commodity are sent from one state with the exception that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another state, or for processing within the state and shipment outside the state of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being

had to any means or device intended to remove transactions in respect thereto from the provisions of this Act.

Relying on the "current of commerce" language contained in §1(8)'s supplemental or explanatory definition of interstate commerce, Respondent argued before the Court of Appeals that Congress intended the provisions of the Act to apply to any transactions involving perishable agricultural commodities, even intrastate transactions, so long as such transactions were "interwoven with the interstate commerce of the commodity." For the reasons discussed *infra*, Respondent's position is clearly erroneous.

Section 1(3) of the Act essentially provides that a transaction is in interstate commerce if it involves the shipment of commodities by a seller in one state to a buyer in another state. Both *Consolidated Citrus Company v. Goldstein*, 214 F. Supp. 823 (E.D. Pa. 1963) and *United States v. Solomon*, 3 F.R.D. 411 (E.D. Ill. 1944), involved situations contemplated by §1(3). In each of those cases the buyer bought agricultural commodities from sellers in states other than their own, causing those commodities to be shipped across state lines. In both of those cases the courts, relying on §1(3), found the transactions to have been in interstate commerce.

Section 1(8) of the Act addresses two entirely different situations. First, it provides that a transaction is in interstate commerce if the buyer purchases agricultural commodities with the intent to ship those commodities across state lines *after purchase* by the buyer. Such a transaction will be considered to be in interstate commerce even where the buyer and seller are located in the same state, so long as the parties to the transaction contemplated the out-of-state shipment of the commodities after purchase. *Krueger v. Acme Fruit Co.*, 75 F.2d 67 (5th Cir. 1935) and *Jackson v. Harrisburg Daily Market, Inc.*, 198 F. Supp. 490 (M.D. Pa. 1961), both deal with this type of situation. In both of those cases the buyers and

sellers were located in the same state, but the buyers purchased the commodities with the intention of shipping them out-of-state after purchase. In both cases the courts found the transactions to be in interstate commerce by relying on the provisions of §1(8) of the Act.

A second situation addressed by §1(8) involves parties to a transaction resorting to a "means or device" in an attempt to remove a transaction from the coverage of the Act. Such a situation confronted the court in *United States v. Klein*, 145 F. Supp. 442 (D. N.J. 1956). In that case defendent, a resident of New Jersey, suffered the suspension of his license to operate as a commission merchant. To avoid the interstate purchase of agricultural commodities, he arranged for another New Jersey resident to act as his agent to buy such commodities in New York. The Court found that the purchase of those commodities, under the arrangement between defendant and his agent, "was a purchase of commodities in interstate commerce."

The record below clearly demonstrates that the two foregoing situations did not exist with respect to the transactions in which Petitioner engaged. In the case at bar the Administrative Law Judge found, and the Judicial Officer affirmed, that C. B. Foods neither purchased the commodities involved in the subject transactions from out-of-state sources, nor did it buy them with the intent to ship them out-of-state, nor did it buy them by some means or device intended to remove the transactions from the provisions of the Act. On the contrary, the evidence clearly showed that C. B. Foods bought goods which were in Pennsylvania from Pennsylvania sellers, and it resold those goods to Pennsylvania buyers. Thus, the transactions engaged in by C. B. Foods which are alleged in the Department's complaint were definitely not within the interstate commerce definitions contained in either §1(3) or §1(8) of the Act.

Unfortunately, none of the cases cited *supra* dealt with the situation involved in the instant case, nor are there any

reported decisions by any federal court on the issue. Thus, Petitioner is without prior judicial support for its position. However, Petitioner believes that its best support may be found in the clear language of PACA.

As this Court has recently stated, the starting point in every case involving the construction of a statute is the language of the statute itself. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322 98 S.Ct. 2370, 57 L.Ed.2d 239 (1978), *cert. denied*, 449 U.S. 831 (1980). Such statutory language will control the construction of a statute where it is sufficiently clear in its context. *Touche Ross & Co. v. Redington*, 442 U.S. 560 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979) *Ernst and Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668, *reh. denied* 425 U.S. 986 (1976).

Petitioner submits that the language of the Act is sufficiently clear, and demonstrates that the transactions herein involved were not in interstate commerce.

2. The Decision Of The Court Of Appeals Extends The Jurisdiction Beyond The Limits Intended By Congress

This Court has often held that the duty of a court in a case calling for the construction of a statute is to ascertain the intent of Congress and to give effect to Congress's legislative will. *Philbrook v. Glodgett*, 421 U.S. 707 95 S.Ct. 1893, 44 L.Ed.2d 525 (1975).

Prior to its passage, the Act was extensively debated in the House of Representatives. During the course of the debates, it became clear that the essential purpose of the Act was to protect shippers from unfair practices which occurred long distances from their places of business, thereby rendering their enforcement of existing legal remedies difficult, if not impossible.

The evil sought to be remedied by Congress was nonpayment for commodities shipped by sellers to distant markets, certainly not the situation in the present case. Further, the debates, particularly in the House, evidence a deep concern over the possible effect of the Act on intrastate commerce. Representative Summers of the State of Washington, principal House sponsor of the bill, stated that, in the opinion of those who had examined it, the bill would *not* interfere with intrastate transactions (see generally, 1930 Congressional Record—House pp. 8537-8557).

The concern by those House members may be well-founded if Respondent's construction of the interstate commerce provisions of the Act is permitted to stand, because the decision effectively permits the jurisdiction of the Secretary of Agriculture to extend to the very situations members of Congress feared it would.

3. The Court Of Appeals Deference To Administrative Construction Is Misplaced

Respondent vigorously argued below that its construction of the interstate commerce provisions of the Act should be accepted under the principal that deference should be paid to the construction of the statute by the administrative agency which administers it.

In the absence of an opinion, it is impossible for Petitioner to know whether the Court of Appeals found this argument persuasive, or relied on it in any way. However, in light of the fact that Respondent's position appears to be clearly erroneous, it would seem logical to assume that the court below did rely on the rule of deference in reaching its decision.

Petitioner is, of course, cognizant of the fact that the principle of deference to an agency's construction of a statute which it administers has long been part of our jurisprudence. The judicial practice of according deference to agency interpre-

tations of law can be traced to the earliest days of the Republic. See *United States v. Vougll,* 9 U.S. (5 Cranch) 368 (1810). Certainly, by the turn of the century the principle was fully developed by this Court, *United States v. Moore,* 95 U.S. 760, 24 L.Ed. 588 (1878); *Hastings & D.R. Co. v. Whitney,* 132 U.S. 357, 10 S.Ct. 112, 33 L.Ed. 363 (1889); *Heath v. Wallace,* 138 U.S. 573, 11 S.Ct. 380, 34 L.Ed. 1063 (1891); *Webster v. Luther,* 163 U.S. 331, 16 S.Ct. 963 41 L.Ed. 179, (1896); *United States v. Hammers,* 221 U.S. 220, 31 S.Ct. 593, 55 L.Ed.2d 710 (1911), and the principle has been consistently reaffirmed by the Supreme Court to the present day. See *Federal Election Commission v. Democratic Senatorial Campaign Committee,* U.S. , 102 S.Ct. 38, 70 L.Ed.2d 23 (1981).

Over the years, however, members of Congress have become concerned that judicial deference to agency interpretations of law has resulted in administrative agencies expanding the scope of their jurisdiction beyond that which Congress intended. This concern was reflected in a bill introduced by Senator Dale Bumpers of Arkansas in 1975, which would have abrogated the principle of deference. Senator Bumper's bill, introduced as Senate Bill No. 67 during the 97th Congress, has now been incorporated as an amendment to Senate Bill No. 1080, The Regulatory Reform Act. Senator Bumper's bill would amend Section 706 of the Administrative Procedure Act (5 U.S.C. §706) to require the reviewing court to "independently...interpret...statutory provisions" and to "hold unlawful and set aside agency action, findings and conclusions found to be...in excess of statutory jurisdiction...." Further, the bill specifically abrogates the doctrine of deference, providing "...the Court shall not accord any presumption in favor of or against agency action...."

Senate Bill No. 1080, including the Bumper's amendment, was passed by the Senate on March 24, 1982. The bill is now pending before the House of Representatives.

In a statement of legislative intent concerning the "no presumption" criterion of subsection (c) of the Bumper's amendment, printed in the Congressional Record—Senate on March 18, 1982 at p. 2406 the Senate stated:

> This prohibition on presumption (of validity of agency interpretation) does not alter the substantive criteria for judicial review under Section 706(a)(2). Those criteria remain uneffected; but the agency's interpretation of a question of law may not be presumed to be correct in determining whether those criteria have been met.

The significance of the proposed amendment to this Court's interpretation of the interstate commerce provisions of the Perishable Agricultural Commodities Act under the facts of the instant case is obvious. A reviewing court would not be obliged, as argued by Respondent to the court below, to follow Respondent's construction of the interstate commerce provisions of the PACA absent a finding that there exists compelling indications that that interpretation is wrong. See *New York State Dept. of Social Services v. Dublino,* 413 U.S. 405, 93 S.Ct. 2507, 37 L.Ed.2d 688 (1973). Rather, the Court would be free, and in fact mandated by Congress, to independently interpret the interstate commerce provisions of the Act in light of all available evidence, including the legislative history of the Act and to determine the scope of Respondent's jurisdiction under the facts of the case at bar.

Petitioner is, of course, aware of the clearly erroneous exception to the deference rule, and this Court's teaching that any consideration of the rule of deference must be constrained by the Court's obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history. *Southeastern Community College v. Davis,* 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979). However, the rule of deference can and does create an undue burden on litigants where, as here, the reviewing court is confronted with an agency

interpretation of longstanding which has never been tested in the federal courts. For this reason, and in light of the rationale behind the Bumpers Amendment, Petitioner respectfully urges that reconsideration of the rule of deference by this Court is indicated.

4. The Decision Of The Court Of Appeals Adopting The Respondent's Interpretation Of The Statute Is Contrary To The Decisions Of This Court Constructing Similar Statutes

In his decision the Judicial Officer, construing the "interstate commerce" provisions of the Act stated:

> Under the more recent Supreme Court holdings, activities transacted wholly within a state may be subject to regulation under the Commerce Clause if they directly or indirectly burden or obstruct commerce.

This "affecting interstate commerce" argument was also advanced by Respondent before the Court of Appeals. Both the Judicial Officer's decision and Respondent's argument completely miss the point of Petitioner's position with respect to the "interstate commerce" provisions of PACA. The issue raised by Petitioner is not whether Congress has the *power* to regulate intrastate transactions of the type involved in the instant case, but rather whether Congress has *exercised* that power to its fullest extent. As noted *supra,* Petitioner submits that it has not.

There are, of course, numerous examples of statutes passed by Congress wherein Congress has chosen not to exercise its power to its constitutional limit. One example, which is particularly apt for comparative purposes to the case at bar, is in the antitrust area.

It is well settled that the Sherman Act (15 U.S.C. §§1, *et seq.*) confers jurisdiction upon the federal courts over certain activities, including sales of goods, which "affect" commerce.

However, the requirements of the Robinson-Patman Act (15 U.S.C. §13) are much stricter than the "affecting commerce" provision of the Sherman Act.

This Court addressed the "in commerce" requirements of the Robinson-Patman Act (15 U.S.C. §13) in *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 95 S.Ct. 392, 42 L.Ed.2d 378 (1974). In that case defendants produced liquid petroleum asphalt at their wholly-owned subsidiaries and others throughout the Western states. Copp produced asphaltic concrete for its own use and for sale to others.

Copp competed with the subsidiaries of some of the defendants in California, none of which had interstate sales. The materials sold, however, were used in the construction of the interstate highway system. Copp alleged various anti-competitive actions of defendants. This Court denied jurisdiction:

> In contrast to §1, the distinct "in commerce" language of the Clayton and Robinson-Patman Act provisions...appears to denote only persons or activities within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer. If this is so, the jurisdictional requirements of these provisions cannot be satisfied merely by showing that allegedly anticompetitive aquisitions and activities *affect* commerce.

(Emphasis in original.) 419 U.S. 195, 42 L.Ed.2d at 386-7.

Further, it is particularly noteworthy, that Robinson-Patman Act jurisdiction is not conferred over intrastate transactions wherein the products sold in such transactions previously traveled interstate. *Scranton Construction Co., Inc. v. Litton Industries Leasing Corp.*, 494 F2d 778 (5th Cir., 1974), *cert. denied*, 419 U.S. 1105 (1975); *Belliston v. Texaco,*

Inc., 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972), *reh. denied*, 409 U.S. 1001 (1972).

Petitioner believes that Respondents' reliance on the "affecting interstate commerce" motion is misplaced. As can be seen from the foregoing discussion of the commerce requirements of the Robinson-Patman Act, Congress need not exercise its power to regulate commerce to the fullest extent permitted by the Commerce Clause. Rather than focusing on the Congress' power to regulate the construction of the interstate commerce provisions of the PACA requires the ascertainment of Congressional intent which for the reasons stated, *supra*, was to exclude from the Secretary's jurisdiction transactions of the sort involved in the instant case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-2197

C. B. FOODS, INC.

Petitioner

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE

Respondent

PETITION FOR REVIEW
DEPARTMENT OF AGRICULTURE
PACA DOCKET NO. 2-5544

Submitted Under Third Circuit Rule 12(6)
March 4, 1982

Before: HUNTER, WEIS and HIGGINBOTHAM,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions of the petitioner and of the Department of Agriculture, it is

ADJUDGED AND ORDERED that the petition for review of the Department of Agriculture order be and is hereby denied.

Costs taxed against petitioner.

APPENDIX A

By the Court,

/s/ JAMES HUNTER, III

James Hunter, III, *Circuit Judge*

Attest:

/s/ SALLY MRVOS

Sally Mrvos, *Clerk*

March 29, 1982

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-2197

C. B. FOODS, INC.,

Petitioner

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by

Petitioner

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ JAMES HUNTER, III

James Hunter, III, *Circuit Judge*

~~March~~ April 29, 1982

APPENDIX C

(Received July 13, 1981)

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	}	**PACA Docket**
C. B. Foods, Inc.,		**No. 2-5544**
Respondent		**Decision and Order**

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*), in which Chief Administrative Law Judge John A. Campbell filed an initial decision and order on May 12, 1981, finding that respondent has committed repeated, flagrant and wilful violations of §2(4) of the Act (7 U.S.C §499b(4)).

On June 4, 1981, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 4 U.S.C. §§556 and 557 has been delegated (7 C.F.R. §2.35).* On June 24, 1981, the Hearing Clerk referred the case to the Judicial Officer for decision.

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. §1.145(d)), was requested by respondent, but is denied inasmuch as the issues raised on appeal are squarely covered by prior precedents.

Upon a careful consideration of the record in this proceeding, Chief Judge Campbell's initial decision is adopted herein,

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*The office of Judicial Officer is a career position established pursuant to the Act of April 4, 1940 (7 U.S.C. §450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app., at 764 (1976). The present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

followed by additional conclusions by the Judicial Officer. The final order is identical to Chief Judge Campbell's order, except that the effective date has been changed in view of the appeal.

ADMINISTRATIVE LAW JUDGE'S DECISION

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) (hereinafter referred to as the "Act" or "PACA"). A complaint was filed on January 25, 1980, against the respondent, C. B. Foods, Inc. The complaint alleged that respondent violated Section 2(4) of the Act (7 U.S.C. 499b(4)) by its failure to make full payment promptly for 293 lots of perishable agricultural commodities sold to respondent by 13 sellers from September 1978 through February 1979, for a total amount of $215,822.82.

The complaint further alleged: that the failure to pay constituted willful, flagrant, and repeated violations of the Act; that respondent filed a voluntary petition in bankruptcy in the United States District Court for the Western District of Pennsylvania on February 26, 1979; and that respondent's license terminated on October 30, 1979, when respondent failed to pay the required license fee. The complaint requested that a finding be issued that respondent had committed willful, flagrant, and repeated violations of sections 2(4) of the Act (7 U.S.C. 499b(4)), and that such finding be published.

Respondent filed an answer on February 19, 1980, in which it admitted its corporate status, its address, its petition for bankruptcy, and the termination of its PACA license. The answer further admitted the purchase of commodities from sellers identified in the complaint, but neither admitted nor denied the transactions specified in the complaint because of a lack of records. In addition, respondent denied violating the Act.

On January 22, 1981, an amended answer was filed which incorporated the original answer and asserted additional defenses. It asserted: that the Act is unconstitutional as it relates to licensees who have been adjudicated or discharged as a bankrupt, and persons responsibly connected to such licensees; that the complaint fails to state a claim upon which relief may be granted; that respondent and its responsibly connected individuals at all times acted in good faith; and that the Secretary "is without jurisdiction to adjudicate claims arising out of the transactions set forth in the complaint."

An oral hearing was held on February 11, 1981, at Pittsburgh, Pennsylvania. Mr. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, represented complainant. Mr. Russell J. Ober, Jr., Rose, Schmidt, Dixon, Hasley, Whyte and Hardesty, represented respondent.

Prior to the hearing, the parties stipulated as follows concerning the transactions: (1) That respondent had purchased, received and accepted 114 of the 293 lots of perishable agricultural commodities alleged in the complaint, and had failed to make full payment promptly for them; (2) that the perishable agricultural commodities involved in these 114 lots were purchased by respondent from 12 sellers located within the State of Pennsylvania; (3) that respondent had no intent to ship such commodities, nor were such commodities shipped or processed for shipment outside Pennsylvania; and (4) that the 12 sellers received such commodities from sources outside Pennsylvania. These 114 transactions occurred from January 1979 through February 1979. The amount which respondent failed to pay in connection with the 114 stipulated transactions was $34,017.15.

At the hearing, complainant introduced testimony by three sellers, establishing that respondent had purchased, received, and accepted from them, in addition to the transac-

tions stipulated, another 108 lots of perishable agricultural commodities, with two sellers requiring payment to be made the Wednesday following the week during which the purchases were made, and the third seller requiring payment up to two weeks from the date of sale. Their testimony established, however, that respondent failed to pay the agreed purchase prices for these 108 lots, totalling $145,879.89. Testimony also established that the three sellers had purchased these commodities from sources outside the State of Pennsylvania.

Findings of Fact

1. Respondent, C. B. Foods, Inc., is a corporation whose address is 21st & Smallman Street, Pittsburgh, Pennsylvania 15222. Pursuant to the licensing provisions of the Act License No. 730498 was issued to respondent on October 30, 1972. This license was renewed annually but terminated on October 30, 1979, pursuant to section 4(a) of the Act (7 U.S.C. 499d(a)), when respondent failed to pay the required annual license fee.

2. During the period January 1979 through February 1979, respondent purchased, received and accepted 222 lots of perishable agricultural commodities from 12 sellers for which respondent failed to make payment of the agreed purchase prices in the total amount of $179,897.04.

3. All of the agricultural commodities acquired by C. B. Foods in connection with the aforesaid 222 transactions were purchased by it from firms located in Allegheny County, Pennsylvania, and were delivered to C. B. Foods' warehouse in Allegheny County, Pennsylvania, without traveling from, through or to any other state.

4. All of the agricultural commodities acquired by C. B. Foods in connection with the aforesaid 222 transactions to which C. B. Foods was a party were previously shipped from states other than Pennsylvania; they were ultimately shipped into Pennsylvania to the facilities of the firms which sold them to C. B. Foods.

5. None of the agricultural commodities acquired by C. B. Foods in connection with the 114 transactions, to which counsel for the parties stipulated, were purchased by C. B. Foods for the purpose of either shipment to another state or for processing within Pennsylvania and for shipment outside of Pennsylvania of the products resulting from such processing. (Tr. 56-57).

6. Prior to 1972, Frank Catanzaro and Sons, a buying broker, serviced 6 or 7 Shop and Save Stores, an independent chain of stores sponsored by a firm called Charley Brothers. A representative of Charley Brothers approached the Catanzaro broker company and suggested that service be expanded to all of the Shop and Save Stores or lose the account for the 7 stores. And so in 1972, the respondent corporation began its existence (separate and apart from the broker enterprise); its purpose was to warehouse and wholesale produce to the Shop and Save chain of stores.

The initial investment in the respondent corporation was $5,000. Credit was extended and respondent's wholesale business expanded, with Charley Brothers accounting for 90%. In the last 2 or 3 years of its affiliation with Charley Brothers, the respondent's business amounted to 12 million dollars per year.

Sometime in 1977, respondent was informed by Charley Brothers that it would open its own warehouse and terminate its business relationship with respondent. A year later, respondent lost the Charley Brothers account. Respondent remained in operation for another year, but with ever increasing financial problems. Respondent borrowed approximately $225,000 from members of the Catanzaro family to keep the business going, but the effort was not successful.

7. On Friday, February 16, 1979, a three day meeting began at respondent's office between representatives of respondent and representatives of three suppliers of produce to respondent—De Masse and Manna Company, Gullo Produce,

and Consumers Produce Company, Inc. After review of respondent's accounts and records it was determined that the three suppliers could no longer extend credit and supply produce to respondent. Respondent's business terminated and on February 25, 1979, respondent filed a voluntary petition in Bankruptcy in the United States District Court for the Western District of Pennsylvania (Bankruptcy No. 79-135).

8. In March of 1979, complaint was notified by its regional office that respondent had filed its bankruptcy petition. After receipt of the Bankruptcy schedule of creditors from the Court, complainant began an investigation to determine if the Act had been violated.

Pertinent Statutory Provisions

Section 1(8)

Definitions:

When used in this chapter—

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(8) A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this chapter. 7 U.S.C.A. 499a(8).

APPENDIX C

Section 2(4)

Unfair conduct:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

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(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction. 7 U.S.C.A. 499b(4)

Conclusions

Based upon the record evidence in this proceeding, it is concluded that:

(1) the Secretary has jurisdiction in this proceeding, and

(2) respondent's failure to make payment of the agreed purchase prices totalling $179,897.04 to 12 sellers in connection with 222 lots of perishable agricultural commodities which respondent purchased, received, and accepted in the course of interstate commerce from January 1979 through February 1979, constitutes willful, flagrant, and repeated violations of section 2(4) of the Act.

1. Respondent contends that the Secretary lacks jurisdiction because the immediate transactions between respondent and its suppliers took place within Pennsylvania. However, this argument is without merit since the commodities involved in the 222 transactions were shipped from California, Texas, Florida, and other states to respondent's suppliers in Pennsylvania. These commodities were "part of that current of commerce usual in the trade in that commodity[1] whereby such commodity...are sent from one State with the expectation that they will end their transit, after purchase, in another–."

In *Dekle Brokerage Co. v. Tatum*, 19 A.D. 521, 523 (1960), the Judicial Officer construing the interstate commerce provisions of the Act held:

> "The sale of produce by one dealer to another dealer, in the same state, is a transaction in interstate commerce if the produce was received by the seller from outside that state prior to the sale. *Gilliland & Company v. San Antonio Commission Company*, 2 A.D. 492; *John Mercurio v. Estes Market*, 7 A.D. 1000; *P. & T. H. Garber, Inc. v. Delia & Cucinotti*, 10 A.D. 238; and *Sunshine Packing Corp. v. K. B. Frosted Foods Co.*, 16 A.D. 574."

In a more recent decision involving the denial of an application for license, *In re: Benny Davila*, 36 A.D. 696, 703 (1977) the Judicial Officer held:

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[1]Q. And, again, how do you know this? How do you know this, Mr. Gullo, that they were obtained from out of state?

A. Because I know the commodities.

Q. Are you saying by the nature of the commodities, then?

A. Yes sir.

Q. Can you elaborate on that sir?

A. Yes sir. May I use this as an example?

Q. Yes.

A. I mean, just on 72 here you have five hampers of beans, well, I don't think they grow beans in Pennsylvania in January. (Tr. 149)

"Under the facts that were developed at the hearing, after the lapse of his license, respondent continued to obtain fruits and vegetables grown outside the State of Texas for his Texas accounts by either purchasing them from other produce companies (such as Alex's Produce) or by obtaining them through a fruit and vegetable broker (such as Willson Davis Company). The commodities included, by way of example, Washington pears, Idaho potatoes and produce from California, Arizona and Florida. Despite the fact that the orders for out-of-state produce were given by intermediaries, respondent continued to act in the capacity of a dealer. Additionally, on those occasions when Willson Davis acted as his broker, respondent was the first recipient in Texas of the interstate shipments. Under these circumstances, respondent was buying and selling perishable agricultural commodities "normally in such current of commerce" and was required by the Act to have a license."

Respondent cites several reparation decisions in which an opposite conclusion seems to be reached. However, it appears from a reading of such cases that there was a failure to prove any movement of commodities in interstate commerce.

"Under the act, the jurisdiction of the Secretary depends upon proof that, among other things, the contested transaction involved interstate or foreign commerce, or was made in contemplation thereof. *P. C. Kellman v. Virginia Tomato Corporation.* 29 A.D. 835 (1970). A review of the evidence in the record leads us to the conclusion that the transaction, herein, did not involve interstate commerce nor did it involve the contemplation thereof.

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While the fact that the transaction was on a transfer in storage basis does not preclude the existence of interstate commerce, it does tend to support respondent's challenge to the existence of interstate commerce in the absence of

evidence to the contrary. Although given the opportunity, *complainant failed to offer any evidence* that the terms of the sale negotiated with Imperial Frozen Foods involved any contemplation of movement of the peas in interstate commerce or any evidence *that the peas were ever actually moved in interstate commerce.* The fact that the buyer, Imperial Frozen Foods, is a New York company and the peas are in Oregon is of no significance without a showing of interstate commerce. *Iwata v. Western Fruit Growers, Inc.*, 90 F.2d 575 (1937). There is no evidence in the record which establishes that the peas moved in or that the sale was negotiated in contemplation of movement in interstate commerce. (Emphasis added). *Wide World of Foods v. Trinity Val. Foods Co.*, 34 A.D. 423, 425-426 (1975).

In this case, there was movement of the commodities in interstate commerce. Consequently, the Secretary has jurisdiction.

2. The record in this proceeding demonstrates that respondent is indebted to sellers for 222 lots of perishable agricultural commodities in the amount of $179,897.04. This failure to pay is clearly in violation of the prohibitions of section 2 of the Act. *Atlantic Produce*, 35 A.D. 1631, 1639, (1976), *aff'd.*, 568 F.2d 772 (CA 4, 1978), *cert. den.*, 439 U.S. 819 (1978). The failure to pay for 222 separate transactions constitutes flagrant and repeated violations of the Act. *G. Steinburg & Son*, 32 A.D. 236, 243-244 (1973), *aff'd sub nom., George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988 (CA 2, 1975) *cert. den.*, 419 U.S. 830; *J.H. Norman & Sons Distributing Co.*, 37 A.D. 705.

The Judicial Officer has ruled on numerous occasions that such violations as were committed by respondent were flagrant and repeated. These rulings have also been upheld by the reviewing courts. *George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988 (CA 2, 1974) and *Zwick v. Freeman*, 373 F.2d 110, 115 (CA 2, 1967), *cert. den.*, 389 U.S. 835 (1967).

In addition, it has been held that PACA disciplinary matters are not subordinate to bankruptcy proceedings, and both may proceed independently. *In re The Zeitzer Food Corp., Inc.*, 36 A.D. 1430, 1441-4 (1977); *Zwick v. Freeman*, 373 F.2d 110, 114-117 (CA 2 1966) *cert. denied* 389 U.S. 835.[2]

Respondent argues (brief pp. 11-14) that complaint failed to prove willfulness and that such failure requires dismissal of the complaint. Respondent sees such failure of proof as a fatal defect because of a lack of notice and opportunity to achieve compliance.

A violation is willful, within the meaning of the Administrative Procedure Act (5 U.S.C. 558), if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *King Midas Packing Co.*, 34 A.D. 1879 (1975); *G. Steinberg & Son, supra*, 32 A.D. at 263-269; *Goodman v. Benson*, 285 F.2d 896, 900 (CA 7, 1961).

The record is clear (See Finding 6) that respondent should have been aware of its financial problems at least 2 years before its business failed. It operated for one year with knowledge that it would lose the Charley Brothers' account, which amounted to 90% of its business. Upon loss of the account, respondent operated the business for another year until members of the agricultural commodity industry literally closed respondent down.

Granted there was no intent to deliberately withhold payment from respondent's suppliers and efforts were made by

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[2]At page 3 of its brief, respondent states:

"In this memorandum the respondent will not address the issue of the constitutionality of the Act as it relates to licensees adjudicated or discharged as bankrupt in recognition of the principle that a federal agency may not declare an Act which it is charged with enforcing to be unconstitutional."

respondent, at considerable financial sacrifice, to remain solvent. However, in the light of the record evidence, respondent acted in careless disregard of the payment requirements of the Act, under which it had been licensed, and consequently respondent's violations were willful.

Because of the willful nature of the violations, there was no necessity to give respondent notice and opportunity to achieve compliance. In addition, as noted by Findings 7 and 8, the respondent was in bankruptcy before complainant was even aware of respondent's financial problems. In otherwords, there was no opportunity to give notice.

3. Respondent at page 14 of its brief alleges a violation of Section 5(c) of the Administrative Procedure Act (5 USC 544(d)) because of the testimony of James Frazier, a Senior Marketing Specialist with the Department of Agriculture. Respondent's reading of that section of the APA is in error. Mr. Frazier appeared as a witness in a public proceeding. He did not participate or advise in this decision.

4. Complainant seeks a finding that respondent committed willful, flagrant, and repeated violations of the Act and that such finding be published.

The testimony at the hearing and case percedent make clear that a finding[3] of willful, flagrant, and repeated violations of section 2(4) of the Act, and publication thereof, is the appropriate sanction to be imposed. That respondent has filed a petition in bankruptcy is irrelevant to the issuance of a sanction, as the institution of bankruptcy proceedings has no effect on the operation of the Act as it pertains to the disciplinary action involved herein. Finally, even if respondent had

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[3]Among the factors not considered here is the effect of such a finding on those responsibly connected with the respondent corporation. Such a factor is not material or relevant to this proceeding. *In re: Baltimore Tomato Company, Inc.*, 39 A.D. 412, 415-416 (1986)

serious financial difficulties, such difficulties resulted from business practices which do not warrant mitigation of complainant's requested sanction.

ADDITIONAL CONCLUSIONS BY JUDICIAL OFFICER

The provisions of the Perishable Agricultural Commodities Act as to interstate commerce (7 U.S.C. §499a(3), (8)) are virtually identical to the provisions of the Packers and Stockyards Act (7 U.S.C. §182(6), 183)). It has been held under both Acts that the statutory provisions apply the familiar current of commerce concept under which intrastate transactions that are interwoven with the current of interstate commerce are "in commerce."[4] Since all of the agricultural commodities involved in this case were shippped into Pennsylvania from other states to the firms which sold them to respondent, a wholesaler, all of the agricultural commodities were still in the current of interstate commerce when purchased by respondent.

Respondent's violations were clearly wilful, as that term is used in regulatory statutes. *In re Shatkin*, 34 Agric. Dec. 296, 297-314 (1975). But even if respondent's violations were not wilful, it would be of no consequence in this case. The Act does not refer to wilful violations, and the deletion of the word wilful from the order in this case would have no effect whatever

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[4]As to the Perishable Agricultural Commodities Act, *see Krueger v. Acme Fruit Co.*, 75 F.2d 67, 67-68 (5th Cir. 1935); *Consolidated Citrus Co. v. Goldstein*, 214 F. Supp. 823, 824-26 (E.D. Pa. 1963); *Jackson v. Harrisburg Daily Market, Inc.*, 198 F. Supp. 490, 491-92 (M.D. Pa. 1961); *United States v. Klein*, 415 F. Supp. 442, 422-43 (D. N.J. 1956); *United States v. Solomon*, 3 F.R.D. 411, 413 (E.D. Ill. 1944). As to the Packers and Stockyards Act, *see Stafford v. Wallace*, 258 U.S. 495, 515-28 (1922); *Bruhn's Freezer Meats of Chicago, Inc. v. USDA*, 438 F.2d 1332, 1339-40 (8th Cir. 1971); *Safeway Stores, Inc. v. Freeman*, 369 F.2d 952, 955-56 (D.C. Cir. 1966); *Trunz Pork Stores, Inc. v. Wallace*, 70 F.2d 688, 689 (2d Cir. 1934); *Folsom-Third Street Meat Co. v. Freeman*, 307 F. Supp. 22, 224-26 (N.D. Cal. 1969); *United States v. Tyson's Poultry, Inc.*, 216 F. Supp. 53, 61-62 (W.D. Ark.), *appeal dismissed by appellant*, 319 F.2d 860 (8th Cir. 1963).

on respondent or on those responsibly connected with respondent. Since this case does not involve the suspension or revocation of a license, a finding can be made that the respondent has committed flagrant or repeated violations of §2 of the Act without first sending a warning letter irrespective of whether the violations were wilful,[5] or the license has terminated.[6]

Order

The respondent has committed repeated, flagrant and wilful violations of §2(4) of the Act (7 U.S.C. §499b(4)). The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

This order shall be effective on the 30th day after service on the respondent.

Done at Washington, D.C.
July 13, 1981

/s/ DONALD A. CAMPBELL
Donald A. Campbell
Judicial Officer
Office of the Secretary

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[5] *Marvin Tragash Co. v. USDA*, 524 F.2d 1255, 1256 n. 1 (5th Cir. 1975); *In re Kafcsak*, 39 Agric. Dec. 683, 685-87 (1980), *appeal docketed*, No. 80-3406 (6th Cir. June 26, 1980); *accord, In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1641 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 262-63 (1973), *aff'd*, 491 F.2d 988, 993-94 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

[6] *Quinn v. Butz*, 510 F.2d 743, 750 (D.C. Cir. 1975); *In re Kafcsak*, 39 Agric. Dec. 683, 685-87 (1980), *appeal docketed*, No. 80-3406 (6th Cir. June 26, 1980); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633, 1643 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 243-45, 261-63, 270 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C. B. FOODS, INC.,

Petitioner

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

Docket No.

PETITION FOR REVIEW OF ORDER

C. B. Foods, Inc., by counsel, hereby petitions this Court for review of the Order of the United States Department of Agriculture entered on July 13, 1981. Pursuant to the provisions of 28 U.S.C. §2344 the petitioner represents as follows:

1. Petitioner seeks review of a disciplinary proceeding brought pursuant to the Perishable Agricultural Commodities Act, as amended (7 U.S.C. §§499a, *et seq.*, hereinafter "Act"), which resulted in a Decision and Order of the Judicial Officer of the United States Department of Agriculture, entered on July 13, 1981, finding that the petitioner herein had committed repeated, flagrant and willful violations of §2(4) of said Act (7 U.S.C. §499b(4)). A true and correct copy of said Decision and Order is attached hereto as Exhibit "A".

2. Petitioner is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania and has its principal place of business in the Third Judicial Circuit at Pittsburgh, Pennsylvania.

3. Petitioner seeks relief on the following grounds:

(a) The Secretary of Agriculture (hereinafter "Secretary") lacked jurisdiction to adjudicate the disciplinary

proceeding commenced against the petitioner by the Director, Fruit and Vegetable Division, Agricultural Marketing Service (hereinafter "Director") in that the Secretary's jurisdiction is limited to transactions in interstate commerce and none of the transactions alleged in the Director's complaint were in interstate commerce;

(b) The evidence adduced by the Director at the hearing held in connection with his complaint was insufficient to support a finding that the petitioner willfully committed repeated and flagrant violations of the Act;

(c) The sanction imposed upon the petitioner by the respondent is not authorized under §9(c) of the Administrative Procedure Act (5 U.S.C. §558(c)) in the absence of proof of willfulness;

(d) Evidence was admitted at the hearing held in connection with the Director's complaint in violation of §5(d) of the Administrative Procedure Act (5 U.S.C. §554(c)).

4. Petitioner prays that this Court to review and set aside the Order of the Judicial Officer, United States Department of Agriculture, dated July 13, 1981, an to order the complaint filed against the petitioner to be dismissed.

Respectfully submitted,

ROSE, SCHMIDT, DIXON & HASLEY

By .../s/ RUSSELL J. OBER, JR.
Russell J. Ober, Jr.

900 Oliver Building
Pittsburgh, Pennsylvania 15222
(412) 434-8600
Attorneys for Petitioner

APPENDIX D

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing Petition for Review of Order were served upon the following interested parties by first class United States Mail, postage prepaid, on the 29th day of July, 1981:

Andrew Y. Stanton, Esq.
Office of the General Counsel
United States Department of Agriculture
Washington, D.C. 20250

Hon. Donald A. Campbell
Judicial Officer, United States
Department of Agriculture
Office of the Secretary
Washington, D.C. 20250

/s/ RUSSELL J. OBER, JR.
Russell J. Ober, Jr.

(Received Jan 25, 1980)

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:

C. B. Foods, Inc., *Respondent* } **COMPLAINT**
PACA Docket No. 2-5544

1. The Director, Fruit and Vegetable Division, Agricultural Marketing Service, acting pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter the "PACA"), the Regulations issued pursuant to the PACA (7 CFR Part 46), and the Rules of Practice Governing Formal Adjudicatory Proceedings, Instituted by the Secretary Under Various Statutes (7 CFR 1.130 *et seq.*; hereinafter the "Rules of Practice") initiates this disciplinary proceeding against C. B. Foods, Inc., a Pennsylvania corporation for violations of the PACA.

2. The address of C. B. Foods, Inc., (hereinafter "Respondent") is 21st & Smallman Street, Pittsburgh, Pennsylvania 15222.

3. Pursuant to the licensing provisions of the PACA, license number 730498 was issued to Respondent on October 30, 1972. This license was renewed annually, but terminated on October 30, 1979, pursuant to Section 4(a) of the PACA (7 U.S.C. 499d(a)) when Respondent failed to pay the required annual license fee.

4. Section 2(4) of the PACA (7 U.S.C. 499b(4)) provides as follows:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied arising out of any undertaking in connection with any such transaction.

5. During the period September 1978, through February 1979, Respondent violated Section 2(4) of the PACA (7 U.S.C. 499b(4)) by purchasing 293 lots of perishable agricultural commodities, shipped by 13 sellers in interstate commerce, which commodities were received and accepted by Respondent, but for which Respondent failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $215,822.82. The details of these transactions are set forth below:

Trans. No.	Seller and Address	Quantity and Commodity	Date Accepted	Date Payment Due	Agreed Purchase Price
1.	Charley Brothers Co.	84 pkgs. strawberries	9-26-78	10-06-78	$714.00
	New Stanton, PA		Amount due & unpaid		$714.00
2.	Demase & Manna Company	30 pkgs. carrots	1-12-79	1-22-79	$348.30
3.	Pittsburgh, PA	500 pkgs. mxd. frt. & veg.	1-22-79	2-01-79	4,681.00
4.	"	415 " " "	1-23-79	2-02-79	4,285.65
5.	"	90 " " "	1-24-79	2-03-79	1,084.90
6.	"	92 " " "	1-25-79	2-05-79	725.62
7.	"	190 " " "	1-26-79	2-05-79	1,886.89
8.	"	609 " " "	1-29-79	2-08-79	5,377.44
9.	"	217 " " "	1-30-79	2-09-79	2,074.77
10.	"	190 " " "	1-31-79	2-10-79	683.25
11.	"	176 " " "	2-01-79	2-12-79	1,273.36
12.	"	35 " " "	2-02-79	2-12-79	338.85
13.	"	934 " " "	2-05-79	2-15-79	11,246.24
14.	"	408 " " "	2-06-79	2-16-79	3,530.63
15.	"	200 " " "	2-07-79	2-17-79	1,745.50
16.	"	158 " " "	2-08-79	2-20-79	1,361.72
17.	"	17 " " "	2-08-79	2-20-79	150.87
18.	"	117 " " "	2-09-79	2-20-79	1,234.97
19.	"	456 " " "	2-12-79	2-22-79	4,387.86
20.	"	55 " " "	2-13-79	2-23-79	519.05

Trans. No.	Seller and Address	Quantity and Commodity	Date Accepted	Date Payment Due	Agreed Purchase Price
21.	Demase & Manna Company	242 " " "	2-14-79	2-24-79	$ 2,329.62
22.	Pittsburgh, PA	163 " " "	2-15-79	2-26-79	1,448.18
23.	(cont.)	235 " " "	2-16-79	2-26-79	2,030.85
			Amount due & unpaid		$52,745.52
24.	Consumers Produce Co.,	340 pkgs. mxd. frt. & veg.	1-15-79	1-25-79	$3,829.90
25.	Inc., of Pittsburgh	325 " " "	1-16-79	1-26-79	3,046.75
26.	Pittsburgh, PA	398 " " "	1-18-79	1-29-79	4,088.08
27.	"	126 pkgs. mxd. veg.	1-19-79	1-29-79	1,464.36
28.	"	502 pkgs. mxd. frt. & veg.	1-22-79	2-01-79	4,899.72
29.	"	122 pkgs. mxd. veg.	1-23-79	2-02-79	932.26
30.	"	351 " "	1-24-79	2-03-79	3,376.11
31.	"	192 " "	1-25-79	2-05-79	1,501.12
32.	"	226 pkgs. mxd. frt. & veg.	1-26-79	2-05-79	2,139.36
33.	"	374 " " "	1-29-79	2-08-79	3,570.14
34.	"	300 pkgs. lettuce	1-29-79	2-08-79	2,883.00
35.	"	155 pkgs. mxd. frt. & veg.	1-30-79	2-09-79	1,016.78
36.	"	221 pkgs. mxd. veg.	1-31-79	2-10-79	2,251.81
37.	"	31 pkgs. mxd. frt. & veg.	2-01-79	2-12-79	246.41
38.	"	135 pkgs. mxd. frt. & veg.	2-02-79	2-12-79	1,634.85
39.	"	550 " " "	2-05-79	2-15-79	6,868.50
40.	"	48 " " "	2-06-79	2-16-79	423.28

Trans. No.	Seller and Address	Quantity and Commodity	Date Accepted	Date Payment Due	Agreed Purchase Price
41.	Consumers Produce Co.,	45 pkgs. mxd. veg.	2-07-79	2-17-79	$ 244.95
42.	Inc., of Pittsburgh	440 pkgs. mxd. frt. & veg.	2-08-79	2-20-79	4,861.26
43.	Pittsburgh, PA	731 " " "	2-12-79	2-22-79	8,015.11
44.	(cont.)	20 pkgs. radishes	2-13-79	2-23-79	42.20
45.	"	318 pkgs. mxd. frt. & veg.	2-15-79	2-26-79	4,015.48
46.	"	67 " " "	2-16-79	2-26-79	420.79
				Total	$61,772.22
				Less Credit	1,160.87
			Amount due & unpaid		$60,611.35
47.	E. B. Banana Co., Inc.	57 pkgs. bananas	1-15-79	1-25-79	$374.25
48.	McKees Rocks, PA	13 " "	1-16-79	1-26-79	87.75
49.	"	54 " "	1-17-79	1-27-79	362.75
50.	"	62 " "	1-18-79	1-29-79	418.50
51.	"	37 " "	1-19-79	1-29-79	249.75
52.	"	45 " "	1-22-79	2-01-79	285.00
53.	"	19 " "	1-23-79	2-02-79	128.25
54.	"	27 " "	1-24-79	2-03-79	182.25
55.	"	53 " "	1-25-79	2-05-79	357.75
56.	"	17 " "	1-26-79	2-05-79	114.75
57.	"	44 " "	1-29-79	2-08-79	297.00
58.	"	68 " "	1-30-79	2-09-79	459.00

Trans. No.	Seller and Address	Quantity and Commodity	Date Accepted	Date Payment Due	Agreed Purchase Price
59.	E. B. Banana Co., Inc.	6 " "	1-31-79	2-10-79	$ 40.50
60.	McKees Rocks, PA	73 " "	2-01-79	2-12-79	492.75
61.	(cont.)	24 " "	2-02-79	2-12-79	162.00
62.	"	47 " "	2-05-79	2-15-79	327.75
63.	"	17 " "	2-06-79	2-16-79	119.00
64.	"	10 " "	2-07-79	2-17-79	70.00
65.	"	69 " "	2-08-79	2-20-79	483.00
66.	"	25 " "	2-09-79	2-20-79	175.00
67.	"	26 " "	2-12-79	2-22-79	178.25
68.	"	31 " "	2-13-79	2-23-79	192.00
69.	"	27 " "	2-14-79	2-24-79	189.00
70.	"	121 " "	2-15-79	2-26-79	822.00
71.	"	15 " "	2-16-79	2-26-79	97.50
			Amount due & unpaid		$6,665.75
72.	Gullo Produce Company,	119 pkgs. mxd. veg.	1-15-79	1-25-79	$1,221.79
73.	Inc., Pittsburgh, PA	58 " "	1-15-79	1-25-79	555.38
74.	"	61 pkgs. mxd. frt. & veg.	1-15-79	1-25-79	506.96
75.	"	10 pkgs. apples	1-16-79	1-26-79	131.10
76.	"	312 pkgs. mxd. veg.	1-16-79	1-26-79	1,684.57
77.	"	57 pkgs. mxd. frt. & veg.	1-16-79	1-26-79	549.47
78.	"	20 pkgs. mxd. frt.	1-17-79	1-27-79	230.95

Trans. No.	Seller and Address	Quantity and Commodity	Date Accepted	Date Payment Due	Agreed Purchase Price
79.	Gullo Produce Company,	14 pkgs. mxd. frt.	1-17-79	1-27-79	$ 95.04
80.	Inc., Pittsburgh, PA	39 pkgs. mxd. veg.	1-17-79	1-27-79	312.93
81.	(cont.)	2 pkgs. watercress	1-17-79	1-27-79	12.60
82.	"	25 pkgs. apples	1-17-79	1-27-79	309.30
83.	"	5 " "	1-17-79	1-27-79	60.55
84.	"	31 pkgs. mxd. veg.	1-18-79	1-29-79	291.63
85.	"	30 pkgs. mxd. frt. & veg.	1-18-79	1-29-79	267.80
86.	"	33 " " "	1-18-79	1-29-79	172.88
87.	"	93 pkgs. mxd. veg.	1-19-79	1-29-79	915.39
88.	"	77 pkgs. mxd. frt. & veg.	1-19-79	1-29-79	850.47
89.	"	10 pkgs. mxd. veg.	1-19-79	1-29-79	43.60
90.	"	239 pkgs. mxd. frt. & veg.	1-22-79	2-01-79	1,860.54
91.	"	131 pkgs. mxd. veg.	1-22-79	2-01-79	788.91
92.	"	10 pkgs. apples	1-22-79	2-01-79	61.10
93.	"	65 pkgs. mxd. frt. & veg.	1-22-79	2-01-79	437.15
94.	"	20 pkgs. mxd. frt.	1-22-79	2-01-79	132.20
95.	"	26 pkgs. lettuce, alfalfa sprouts	1-23-79	2-02-79	247.83
96.	"	17 pkgs. mxd. frt. & veg.	1-23-79	2-02-79	151.87
97.	"	285 pkgs. mxd. veg.	1-24-79	2-03-79	2,168.85
98.	"	10 pkgs. mxd. frt.	1-24-79	2-03-79	76.10
99.	"	45 pkgs. mxd. frt. & veg.	1-24-79	2-03-79	363.95

Trans. No.	Seller and Address	Quantity and Commodity	Date Accepted	Date Payment Due	Agreed Purchase Price
100.	Gullo Produce Company,	5 pkgs. celery	1-24-79	2-03-79	$ 55.55
101.	Inc., Pittsburgh, PA	15 " "	1-25-79	2-05-79	166.65
102.	(cont.)	20 pkgs. mxd. frt. & veg.	1-25-79	2-05-79	174.02
103.	"	113 pkgs. mxd. veg.	1-25-79	2-05-79	1,125.83
104.	"	10 pkgs. grapes	1-25-79	2-05-79	108.60
105.	"	10 pkgs. mxd. frt.	1-25-79	2-05-79	141.10
106.	"	27 pkgs. mxd. frt. & veg.	1-26-79	2-05-79	279.91
107.	"	5 pkgs. pineapples	1-26-79	2-05-79	28.05
108.	"	82 pkgs. lettuce, watercress & alfalfa sprouts	1-26-79	2-05-79	765.22
109.	"	363 pkgs. tomatoes	1-26-79	2-05-79	3,359.43
110.	"	391 pkgs. mxd. veg.	1-28-79	2-07-79	2,784.66
111.	"	35 " "	1-29-79	2-08-79	363.85
112.	"	98 pkgs. mxd. frt. & veg.	1-29-79	2-08-79	955.78
113.	"	50 pkgs. onions	1-29-79	2-08-79	230.50
114.	"	40 pkgs. broccoli	1-30-79	2-09-79	284.40
115.	"	178 pkgs. mxd. veg.	1-30-79	2-09-79	1,146.68
116.	"	29 pkgs. mxd. frt. & veg.	1-30-79	2-09-79	292.69
117.	"	5 pkgs. mxd. veg.	1-30-79	2-09-79	32.56
118.	"	23 pkgs. mxd. frt. & veg.	1-31-79	2-10-79	238.31
119.	"	35 " " "	2-01-79	2-12-79	267.59
120.	"	21 " " "	2-01-79	2-12-79	245.31

Trans. No.	Seller and Address	Quantity and Commodity	Date Accepted	Date Payment Due	Agreed Purchase Price
121.	Gullo Produce Company,	30 pkgs. mxd. veg.	2-01-79	2-12-79	$ 245.30
122.	Inc., Pittsburgh, PA	79 " "	2-02-79	2-12-79	684.94
123.	(cont.)	5 pkgs. apples	2-02-79	2-12-79	71.80
124.	"	92 pkgs. mxd. frt. & veg.	2-02-79	2-12-79	1,075.90
125.	"	356 pkgs. mxd. veg.	2-05-79	2-15-79	3,231.11
126.	"	200 pkgs. onions	2-05-79	2-15-79	722.00
127.	"	3 pkgs. leeks & beans	2-05-79	2-15-79	41.33
128.	"	75 pkgs. mxd. frt. & veg.	2-05-79	2-15-79	898.00
129.	"	115 " " "	2-05-79	2-15-79	788.45
130.	"	10 pkgs. frt.	2-05-79	2-15-79	121.10
131.	"	3 pkgs. cabbage	2-05-79	2-15-79	26.58
132.	"	3 pkgs. mxd. frt.	2-06-79	2-16-79	34.33
133.	"	1 pkg. artichoke	2-06-79	2-16-79	17.11
134.	"	7 pkgs. frt.	2-06-79	2-16-79	72.36
135.	"	17 pkgs. cauliflower	2-06-79	2-16-79	137.87
136.	"	5 pkgs. lemons	2-06-79	2-16-79	51.80
137.	"	9 pkgs. berries	2-06-79	2-16-79	86.22
138.	"	24 pkgs. mxd. veg.	2-06-79	2-16-79	204.54
139.	"	15 pkgs. mxd. frt.	2-07-79	2-17-79	92.67
140.	"	78 pkgs. mxd. veg.	2-07-79	2-17-79	637.19
141.	"	5 pkgs. grapefruit	2-07-79	2-17-79	28.05
142.	"	15 pkgs. mxd. frt.	2-08-79	2-20-79	129.90

Trans. No.	Seller and Address	Quantity and Commodity	Date Accepted	Date Payment Due	Agreed Purchase Price
143.	Gullo Produce Company,	1 pkg. celery	2-08-79	2-20-79	$ 12.11
144.	Inc., Pittsburgh, PA	18 pkgs. mxd. veg.	2-08-79	2-20-79	135.16
145.	(cont.)	3 pkgs. leeks	2-08-79	2-20-79	40.83
146.	"	50 pkgs. berries	2-08-79	2-20-79	529.00
147.	"	75 pkgs. lettuce	2-08-79	2-20-79	383.25
148.	"	200 " "	2-09-79	2-20-79	1,022.00
149.	"	20 pkgs. peppers	2-09-79	2-20-79	142.20
150.	"	2 pkgs. yams	2-09-79	2-20-79	15.72
151.	"	15 pkgs. lettuce	2-09-79	2-20-79	113.76
152.	"	75 " "	2-09-79	2-20-79	568.50
153.	"	40 pkgs. mxd. frt.	2-09-79	2-20-79	405.65
154.	"	46 pkgs. mxd. frt.	2-12-79	2-22-79	481.56
155.	"	166 pkgs. mxd. veg.	2-12-79	2-22-79	1,196.85
156.	"	3 " "	2-12-79	2-22-79	22.74
157.	"	7 " "	2-12-79	2-22-79	56.06
158.	"	10 pkgs. pineapples	2-12-79	2-22-79	56.10
159.	"	3 pkgs. veg.	2-12-79	2-22-79	30.33
160.	"	29 pkgs. mxd. veg.	2-13-79	2-23-79	278.24
161.	"	5 pkgs. grapefruit	2-13-79	2-23-79	28.05
162.	"	178 pkgs. lettuce	2-13-79	2-23-79	1,621.58
163.	"	11 pkgs. mxd. frt.	2-13-79	2-23-79	109.73
164.	"	62 " "	2-14-79	2-24-79	599.32

Trans. No.	Seller and Address	Quantity and Commodity	Date Accepted	Date Payment Due	Agreed Purchase Price
165.	Gullo Produce Company, Inc., Pittsburgh, PA	124 pkgs. lettuce, beans, sprouts & onions	2-14-79	2-24-79	$ 554.98
166.	(cont.)	2 pkgs. frt.	2-14-79	2-24-79	24.72
167.	"	93 pkgs. mxd. veg.	2-15-79	2-26-79	893.61
168.	"	2 pkgs. frt.	2-15-79	2-26-79	24.22
169.	"	54 pkgs. mxd. frt.	2-15-79	2-26-79	574.94
170.	"	1 pkg. cantaloupe	2-16-79	2-26-79	29.61
171.	"	1 pkg. artichoke	2-16-79	2-26-79	17.11
172.	"	234 pkgs. mxd. veg.	2-16-79	2-26-79	1,745.74
173.	"	34 pkgs. mxd. frt. & veg.	2-16-79	2-26-79	313.24
174.	"	15 pkgs. onions	2-16-79	2-26-79	54.15
			Amount due & unpaid		$49,027.21
175.	J. E. Corcoran Company Pittsburgh, PA	10 pkgs. mxd. veg.	1-22-79	2-01-79	$76.10
176.	"	17 pkgs. mxd. frt. & veg.	1-24-79	2-03-79	146.87
177.	"	3 pkgs. mxd. veg.	1-25-79	2-05-79	34.33
178.	"	78 pkgs. mxd. frt. & veg.	1-25-79	2-05-79	600.08
179.	"	27 " " "	1-29-79	2-08-79	221.97
180.	"	9 " " "	1-30-79	2-09-79	79.24
181.	"	54 " " "	1-31-79	2-10-79	437.94
182.	"	15 pkgs. mxd. frt.	2-01-79	2-12-79	118.65
183.	"	15 pkgs. mxd. frt. & veg.	2-02-79	2-12-79	136.65

Trans. No.	Seller and Address	Quantity and Commodity	Date Accepted	Date Payment Due	Agreed Purchase Price
184.	J. E. Corcoran Company	70 pkgs. mxd. frt.	2-05-79	2-15-79	$ 474.70
185.	Pittsburgh, PA	83 pkgs. mxd. frt. & veg.	2-06-79	2-16-79	669.13
186.	(cont.)	30 " " "	2-07-79	2-17-79	203.30
187.	"	25 " " "	2-08-79	2-20-79	282.75
188.	"	46 " " "	2-09-79	2-20-79	353.06
189.	"	62 " " "	2-12-79	2-22-79	510.57
190.	"	2 pkgs. tangerines	2-15-79	2-26-79	19.22
			Amount due & unpaid		$4,364.56
191.	Corso Potato Co.	30 pkgs. potatoes	1-22-79	2-01-79	$189.90
192.	Pittsburgh, PA	50 " "	1-24-79	2-03-79	329.00
193.	"	225 " "	1-30-79	2-09-79	1,293.00
194.	"	61 " "	2-12-79	2-22-79	352.88
				Total	$2,164.78
				Less Credit	79.04
			Amount due & unpaid		$2,085.74
195.	Descalzi Produce	8 pkgs. mxd. frt. & veg.	1-22-79	2-01-79	$124.42
196.	Company, Inc.	8 pkgs. endive & apples	1-24-79	2-03-79	133.20
197.	Pittsburgh, PA	2 pkgs. squash	1-25-79	1-05-79	13.72
198.	"	15 pkgs. apples	1-26-79	2-05-79	95.40
199.	"	44 pkgs. apples & sweet potatoes	1-29-79	2-08-79	295.06

Trans. No.	Seller and Address	Quantity and Commodity	Date Accepted	Date Payment Due	Agreed Purchase Price
200.	Descalzi Produce	2 pkgs. papayas	1-31-79	2-10-79	$ 16.66
201.	Company, Inc. Pittsburgh, PA	4 pkgs. papayas & coconuts	2-02-79	2-12-79	32.32
202.	(cont'd)	23 pkgs. mxd. frt. & veg.	2-05-79	2-15-79	132.18
203.	"	4 pkgs. endive & garlic	2-08-79	2-20-79	76.82
204.	"	3 pkgs. endive	2-09-79	2-20-79	60.24
205.	"	1 pkgs. sweet potatoes	2-12-79	2-22-79	7.11
206.	"	2 pkgs. veg.	2-13-79	2-23-79	14.72
207.	"	11 pkgs. grapes & garlic	2-14-79	2-24-79	162.38
208.	"	15 pkgs. ugli frt., sweet potatoes, papayas & avocados	2-15-79	2-26-79	130.35
209.	"	12 pkgs. mxd. frt. & veg.	2-16-79	2-26-79	145.32
				Total	$1,439.90
				Less Credit	215.32
				Amount due & unpaid	$1,224.58
210.	Mieze Jet-Air Sales Inc., Pittsburgh, PA	431 pkgs. strawberries, tomatoes & squash	1-22-79	2-01-79	$5,101.01
211.	"	1 pkg. shallots	1-23-79	2-02-79	7.55

Trans. No.	Seller and Address	Quantity and Commodity	Date Accepted	Date Payment Due	Agreed Purchase Price
212.	Mieze Jet-Air	9 pkgs. carrots	1-24-79	2-03-79	$ 117.99
213.	Sales Inc.,	46 pkgs. spinach & broccoli	1-25-79	2-05-79	351.06
214.	Pittsburgh, PA	1 pkg. celery	1-26-79	2-05-79	13.11
215.	(cont'd)	14 pkgs. mxd. veg.	1-26-79	2-05-79	104.38
216.	"	139 pkgs. horseradish, avocados, grapes & tomatoes	1-29-79	2-08-79	1,676.11
217.	"	27 pkgs. mxd. veg.	1-30-79	2-09-79	217.97
218.	"	6 pkgs. yams & nappas	2-01-79	2-12-79	57.16
219.	"	52 pkgs. mxd. veg.	2-02-79	2-12-79	311.12
220.	"	2 pkgs. veg.	2-06-79	2-16-79	22.22
221.	"	1 pkg. watercress	2-07-79	2-17-79	6.33
222.	"	4 pkgs. grapes	2-07-79	2-17-79	64.32
223.	"	505 pkgs. mxd. veg.	2-07-79	2-17-79	6,858.05
224.	"	1 pkg. grapes	2-07-79	2-17-79	16.11
225.	"	10 " "	2-08-79	2-20-79	161.10
226.	"	8 pkgs. tomatoes	2-09-79	2-20-79	32.64
227.	"	20 pkgs. mxd. veg.	2-09-79	2-20-79	146.90
228.	"	10 pkgs. celery	2-09-79	2-20-79	121.10
229.	"	36 pkgs. mxd. veg.	2-12-79	2-22-79	280.63
230.	"	128 pkgs. dates, figs, berries & tomatoes	2-12-79	2-22-79	1,706.93
231.	"	33 pkgs. mxd. frt. & veg.	2-14-79	2-24-79	286.13
232.	"	51 pkgs. lettuce, yams, berries & nappas	2-15-79	2-26-79	478.91
			Amount due & unpaid		$18,138.88

Trans. No.	Seller and Address	Quantity and Commodity	Date Accepted	Date Payment Due	Agreed Purchase Price
233.	A. M. Mantia, Inc.	5 pkgs. mxd. veg.	1-22-79	2-01-79	$ 34.55
234.	Pittsburgh, PA	32 pkgs. mxd. frt. & veg.	1-23-79	2-02-79	356.52
235.	"	44 pkgs. mxd. veg.	1-24-79	2-03-79	444.84
236.	"	1 pkgs. bean sprouts	1-25-79	2-05-79	5.80
237.	"	70 pkgs. mxd. veg.	1-26-79	2-05-79	377.20
238.	"	41 " "	1-29-79	2-08-79	180.11
239.	"	54 " "	1-30-79	2-09-79	258.69
240.	"	1 pkg. sweet potatoes	1-31-79	2-10-79	8.11
241.	"	6 pkgs. mxd. veg.	2-01-79	2-12-79	41.01
242.	"	27 pkgs. mxd. frt. & veg.	2-02-79	2-12-79	125.47
243.	"	84 " " "	2-05-79	2-15-79	561.81
244.	"	3 pkgs. parsnip	2-05-79	2-15-79	33.33
245.	"	4 pkgs. sweet potatoes	2-06-79	2-16-79	30.44
246.	"	61 pkgs. mxd. veg.	2-07-79	2-17-79	275.09
247.	"	2 pkgs. mxd. frt. & veg.	2-08-79	2-20-79	13.72
248.	"	5 pkgs. peppers	2-09-79	2-20-79	35.55
249.	"	202 pkgs. mxd. frt. & veg.	2-12-79	2-22-79	1,617.22
250.	"	8 " " "	2-13-79	2-23-79	55.88
251.	"	6 " " "	2-14-79	2-24-79	47.16
252.	"	11 pkgs. mxd. veg.	2-15-79	2-26-79	54.21
253.	"	48 " "	2-16-79	2-26-79	289.12
			Amount due & unpaid		$4,845.83

Trans. No.	Seller and Address	Quantity and Commodity	Date Accepted	Date Payment Due	Agreed Purchase Price
254.	Tom Ayoob, Inc.	6 pkgs. collards	1-23-79	2-02-79	$ 36.66
255.	Pittsburgh, PA	4 " "	1-24-79	2-03-79	24.44
256.	"	10 " "	1-29-79	2-08-79	61.10
257.	"	35 pkgs. mxd. veg.	2-02-79	2-12-79	278.85
258.	"	2 " "	2-02-79	2-12-79	26.22
259.	"	3 " "	2-07-79	2-17-79	36.33
260.	"	13 " "	2-12-79	2-22-79	105.43
261.	"	6 " "	2-14-79	2-24-79	43.66
262.	"	27 " "	2-15-79	2-26-79	201.97
263.	"	29 " "	2-16-79	2-26-79	235.19
264.	"	26 " "	2-16-79	2-26-79	184.86
265.	"	1 pkg. savoy	2-16-79	2-26-79	10.11
			Amount due & unpaid		$1,244.82
266.	Clarence Miller	236 pkgs. mxd. veg.	1-22-79	2-01-79	$1,009.46
267.	Pittsburgh, PA	5 pkgs. apples	1-23-79	2-02-79	34.30
268.	"	8 pkgs. mxd. veg.	1-24-79	2-03-79	86.88
269.	"	102 " "	1-26-79	2-05-79	996.42
270.	"	92 " "	1-29-79	2-08-79	928.62
271.	"	31 pkgs. peppers	1-30-79	2-09-79	328.91
272.	"	9 pkgs. beans	1-31-79	2-10-79	104.49
273.	"	4 pkgs. yellow squash	2-01-79	2-12-79	20.44

Trans. No.	Seller and Address	Quantity and Commodity	Date Accepted	Date Payment Due	Agreed Purchase Price
274.	Clarence Miller	200 pkgs. cabbage	2-01-79	2-12-79	$ 772.00
275.	Pittsburgh, PA	7 pkgs. mxd. veg.	2-02-79	2-12-79	96.27
276.	(cont'd)	50 pkgs. cabbage	2-05-79	2-15-79	455.50
277.	"	86 pkgs. mxd. veg.	2-06-79	2-16-79	800.71
278.	"	1 pkg. yellow squash	2-06-79	2-16-79	5.11
279.	"	151 pkgs. cabbage	2-07-79	2-17-79	700.61
280.	"	1 pkg. cubanelle	2-07-79	2-17-79	11.61
281.	"	2 pkgs. yellow squash	2-08-79	2-20-79	10.22
282.	"	205 pkgs. mxd. veg.	2-09-79	2-20-79	1,513.55
283.	"	40 pkgs. tomatoes	2-12-79	2-22-79	364.40
284.	"	50 pkgs. cabbage	2-12-79	2-22-79	530.50
285.	"	215 " "	2-13-79	2-23-79	1,596.15
286.	"	35 pkgs. tomatoes	2-16-79	2-26-79	301.35
				Total	$10,667.50
				Less Credit	12.22
				Amount due & unpaid	$10,655.28
287.	The Union Fruit	315 pkgs. mxd. frt.	1-29-79	2-08-79	$1,746.75
288.	Auction Co.,	30 " "	1-29-79	2-08-79	222.15
289.	Pittsburgh, PA	100 " "	1-31-79	2-10-79	228.00
290.	"	100 " "	2-05-79	2-15-79	455.00
291.	"	8 " "	2-05-79	2-15-79	79.84
292.	"	75 " "	2-12-79	2-22-79	690.50
293.	"	17 " "	2-14-79	2-24-79	77.06
				Amount due & unpaid	$3,499.30

The total of the amounts unpaid these 13 sellers is $215,822.82.

6. On February 26, 1979, Respondent filed a Voluntary Petition in Bankruptcy, Number 79-135 in the United States District Court for the Western District of Pennsylvania.

7. The acts of Respondent in failing to make full payment promptly of the agreed purchase prices for the perishable agricultural commodities it purchased as alleged in paragraph 5 of this Complaint constitute willful, flagrant and/or repeated violations of the PACA.

WHEREFORE, it is requested that after proceedings are had in accordance with the PACA and the Rules of Practice (7 CFR 1.130 through 1.151), a finding be made pursuant to Section 8 of the PACA (7 U.S.C. 499h), that Respondent has willfully committed flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. 499b(4)), and the facts and circumstances of such violations be published.

Respondent's attention is directed to Sections 1.136, 1.139 and 1.141 of the Rules of Practice (7 CFR 1.136, 1.139 and 1.141), which specify, *inter alia*, the time for filing an Answer, the contents of an Answer, the effect of failure to file an Answer, and the effect of failure to request an oral hearing.

Done at Washington, D.C. Jan 23, 1980

.../s/.....
Director
Fruit and Vegetable Division
Agricultural Marketing Service
Complainant

U.S. Department of Agriculture
Office of the General Counsel
Washington, D.C. 20250

By: .../s/.....
Attorney for Complainant
(202) 447-5562

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In Re:

C. B. FOODS, INC., *Respondent.* — **PACA Docket No. 2-5544**

AMENDED ANSWER

Respondent, by its attorneys, Russell J. Ober, Jr. and Rose, Schmidt, Dixon, Hasley, Whyte and Hardesty, files an Amended Answer, pursuant to §1.137 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, to the Complaint filed by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, as follows:

FIRST DEFENSE

1. It is admitted that C. B. Foods, Inc. is a Pennsylvania corporation.

2. It is admitted that the registered office of C. B. Foods, Inc. is 21st & Smallmen Street, Pittsburgh, Pennsylvania 15222.

3. It is admitted that License No. 730498 was issued to Respondent on October 30, 1972, pursuant to the licensing provisions of the Perishable Agricultural Commodities Act. It is further admitted that said License was renewed annually until its termination on October 30, 1979 as a result of nonpayment of the annual license fee by Respondent.

4. The averments contained in Paragraph 4 of the aforesaid Complaint are conclusions of law to which no responsive pleading is required.

5. It is denied that Respondent, during the period September 1978 through February 1979 violated §2(4) of the Per-

ishable Agricultural Commodities Act (7 U.S.C. §499b(4)). By way of further answer, Respondent admits that during the period material to the Complaint, it acquired certain lots of perishable agricultural commodities from the sellers identified in Paragraph 5 of the Complaint; however, Respondent does not have possession nor access to its records evidencing those transactions and, therefore, it unable to admit or deny the specific averments contained in Paragraph 5 of the Complaint.

6. It is admitted that on February 26, 1979 Respondent filed a Petition for Bankruptcy in the United States District Court for the Western District of Pennsylvania at Bankruptcy Docket No. 79-135.

7. It is denied that Respondent has committed willful, flagrant and/or repeated violations of the Perishable Agricultural Commodities Act.

SECOND DEFENSE

8. The provisions of the Perishable Agricultural Commodities Act, as they relate to licensees under the Act who have been adjudicated or discharged as bankrupt, and persons responsibly connected to such licensees, are violative of the Constitution of the United States of America and the several amendments thereto.

THIRD DEFENSE

9. The Complaint filed against the Respondent fails to state a claim upon which relief may be granted.

FOURTH DEFENSE

10. The Respondent, and the persons allegedly responsibly connected to Respondent, at all times acted with good faith.

FIFTH DEFENSE

11. The Secretary of Agriculture is without jurisdiction to adjudicate claims arising out of the transactions set forth in the Complaint.

WHEREFORE, Respondent requests that the Complaint filed by the Director of the Fruit and Vegetable Division, Agricultural Marketing Service, be dismissed.

ROSE, SCHMIDT, DIXON, HASLEY,
WHYTE, & HARDESTY

By /s/.....

900 Oliver Building
Pittsburgh, Pennsylvania 15222
(412) 434-8600
Attorneys for Respondent

APPENDIX G

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

IN RE C. B. FOODS, INC., **PACA Docket**
Respondent. **No. 2-5544**

STIPULATION

The parties hereto, by counsel, do hereby stipulate and agree that the following facts are true and correct:

1. C. B. Foods, Inc., the Respondent herein, is a corporation which was granted a charter by the Secretary of the Commonwealth of Pennsylvania on October 13, 1972, and at all times material to the instant proceeding maintained its principal place of business at 21st and Smallman Streets, City of Pittsburgh, Allegheny County, Pennsylvania.

2. On October 30, 1972, the Department of Agriculture issued to Respondent, pursuant to the provisions of the Perishable Agricultural Commodities Act, License No. 730498, which authorized Respondent to engage in the wholesale handling of fresh fruits and vegetables.

3. On February 26, 1979, Respondent, filed a voluntary Petition in Bankruptcy in the United States District Court for the Western District of Pennsylvania at Bankruptcy No. 79-135.

4. On October 30, 1979, Respondent's License No. 730498 was terminated pursuant to Section 4(a) of the Perishable Agricultural Commodities Act when it failed to pay the required annual licensing fee.

5. During the months of January and February, 1979, Respondent ordered and took delivery of 114 lots of various agricultural commodities identified in the Complaint by the following transaction numbers: 2, 34, 44, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 81, 95, 100, 104, 107, 108, 109, 113, 114, 126, 127, 131, 133,

135, 136, 137, 141, 143, 145, 146, 147, 148, 149, 150, 151, 152, 158, 161, 162, 165, 170, 171, 174, 190, 191, 192, 193, 194, 196, 197, 199, 200, 201, 203, 204, 205, 207, 208, 210, 211, 212, 213, 214, 215, 218, 221, 222, 223, 224, 225, 226, 228, 230, 232, 236, 240, 244, 245, 248, 254, 255, 256, 265, 270, 272, 273, 274, 276, 278, 279, 280, 282, 283, 284, 285 and 286.

6. Respondent failed to make full payment promptly of the agreed purchase prices for the various agricultural commodities it acquired in connection with the 114 transactions identified in the preceding paragraph.

7. All of the agricultural commodities acquired by Respondent in connection with the aforesaid 114 transactions were purchased by it from firms located in Allegheny County, Pennsylvania, and were delivered to Respondent's warehouse in Allegheny County, Pennsylvania, without traveling from, through or to any other State.

8. All of the agricultural commodities acquired by Respondent in connection with the aforesaid 114 transactions to which Respondent was a party were previously shipped from States other that Pennsylvania; they were ultimately shipped into Pennsylvania to the facilities of the firms which sold them to Respondent.

9. None of the agricultural commodities acquired by Respondent in connection with the aforesaid 114 transactions were purchased by Respondent for the purpose of either shipment to another State or for processing within Pennsylvania and for shipment outside of Pennsylvania of the products resulting from such processing.

10. None of the Agricultural commodities acquired by Respondent in connection with the aforesaid 114 transactions were in fact shipped by Respondent to another State or were processed by Respondent within Pennsylvania for the ship-

ment outside of Pennsylvania of the products resulting from such processing.

.....

Andrew Y. Stanton
Attorney for Complainant

...../s/ Russell J. Ober, Jr.....

Russell J. Ober, Jr.
Attorney for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing Petition for Writ of Certiorari were served upon the following interested parties by first class United States mail, postage prepaid, on May 28, 1982:

Terrence G. Jackson, Esq.
James Michael Kelly, Esq.
Raymond W. Fullerton, Esq.
Andrew Y. Stanton, Esq.
Office of the General Counsel
United States Department of Agriculture
Washington, D.C. 20250

Solicitor General
United States Department of Justice
Washington, D.C. 20530

ROSE, SCHMIDT, DIXON & HASLEY

By .....
Russell J. Ober, Jr.